JOCELINE TAN POH CHOO & ORS

v.

V MUTHUSAMY

FEDERAL COURT, PUTRAJAYA
ABDUL MALEK AHMAD PCA
STEVE SHIM CJ (SABAH & SARAWAK)
SITI NORMA YAAKOB FCJ
[CIVIL APPEAL NO: 02-4-2004 (P)]
13 MAY 2005

TORT: *Defamation - Libel - Newspaper report of court proceedings - Whether report may include extracts of pleadings in statement of claim - Whether pleadings should first be read out in course of proceedings before publication - Whether report published should be fair, accurate and contemporaneous report of proceedings - Whether defence of absolute privilege available - Defamation Act 1957, s. 11(1)*

The respondent, a lawyer, commenced an action against the appellants in the High Court for libel arising from the publication of a report that appeared in a leading local newspaper. The said report ('the report') concerned High Court proceedings in respect of an action commenced by another against the respondent with extracts taken from pleadings in the amended statement of claim filed in the said High Court. The appellants submitted that the said extracts did in fact contain allegations of fraud and misrepresentations as well as allegations of conspiracy against the respondent in breach of contract and contrary to professional etiquette and ethics. The High Court held that the appellants failed to prove that the report was a fair and accurate and contemporaneous report of the court proceedings. On appeal to the Court of Appeal, it was held that the publication of part of the amended statement of claim which had not been read out in open court was not within the scope of the protection given by s. 11(1) of the Defamation Act 1957 ('the Act'). The Federal Court granted the appellants leave to appeal on the following question: whether a fair and accurate report of the proceedings publicly heard before the High Court may include an extract of the pleadings and if so, whether the pleadings should first be read out in the course of the proceedings before publication can be made of the pleadings.

Held (allowing the appeal)
Per Abdul Malek Ahmad PCA delivering the judgment of the court:

[1] It was obvious that those who read the appellants' report would have questioned the respondent's honesty because nothing was mentioned in the report about his averments despite serious allegations of his dishonesty taken from the amended statement of claim. The real issue was whether the report published by the appellants was a fair and accurate and contemporaneous report of the court proceedings. The crucial words of s. 11(1) of the Act are the opening words, *ie*, "A fair and accurate and contemporaneous report …" and not the words "publicly heard". Only reports that are fair and accurate and contemporaneous are absolutely privileged. Not all reports of proceedings publicly heard would be absolutely privileged. Therefore, the defence of absolute privilege would be available only if a report of proceedings publicly heard is fair and accurate and contemporaneous. (p 172 e-g)

[2] The authorities and the arguments show that a report of the court proceedings publicly heard before the High Court may include an extract of the pleadings. Also, it is not necessary that the pleadings should first be read out in the course of the proceedings before publication can be made. It followed that the first part of the question posed before the court should be answered in the positive whilst the second part of the question thereof should be answered in the negative. However, it must be reiterated that the essence of s. 11(1) of the Act is whether the report published is a fair and accurate and contemporaneous report of the proceedings. Additionally, it is possible to publish a fair and accurate and contemporaneous report with or without including an extract of the pleadings. Section 11(1) of the Act is abundantly clear in statutorily declaring that a fair and accurate and contemporaneous report of court proceedings shall enjoy absolute privilege against an action for defamation. (p 179 a-c)

*[**Bahasa Malaysia** Translation Of Headnotes*

Responden, seorang peguam, memulakan tindakan terhadap perayu-perayu di Mahkamah Tinggi untuk libel berbangkit dari penyiaran suatu laporan yang diterbitkan di dalam suatu surat khabar tempatan yang utama. Penyiaran laporan tersebut ('laporan tersebut') adalah mengenai prosiding Mahkamah Tinggi di mana tindakan diambil oleh seorang yang lain terhadap responden dengan petikan-petikan diambil dari pliding dalam pernyataan tuntutan yang difailkan di Mahkamah Tinggi tersebut. Perayu-perayu berhujah bahawa petikan-petikan tersebut memang mengandungi dakwaan-dakwaan fraud dan salah nyataan dan juga dakwaan-dakwaan konspirasi terhadap responden dalam kemungkiran

kontrak dan bertentangan etiket dan etika profesional. Mahkamah Tinggi memutuskan bahawa perayu-perayu gagal membuktikan laporan tersebut adil dan tepat dan muktahir mengenai prosiding mahkamah tersebut. Apabila dirayui, Mahkamah Rayuan memutuskan bahawa penyiaran sebahagian pernyataan tuntutan yang tidak dibaca di hadapan mahkamah terbuka tidak dilindungi oleh s. 11(1) Akta Fitnah 1957 ('Akta tersebut'). Kini, Mahkamah Persekutuan memberikan perayu-perayu kebenaran merayu atas soalan berikut: sama ada suatu laporan prosiding yang adil dan tepat didengar secara awam di hadapan Mahkamah Tinggi boleh mengandungi petikan pliding dan jika demikian, sama ada pliding patut dibaca semasa prosiding berjalan terlebih dahulu sebelum penyiarannya boleh dibuat.

Diputuskan (membenarkan rayuan)
Oleh Abdul Malek Ahmad PMR menyampaikan penghakiman mahkamah:

[1] Jelas bahawa orang yang membaca laporan tersebut akan mempersoal kejujuran responden kerana tiada apa yang disebut dalam laporan tersebut mengenai pendiriannya walaupun dakwaan-dakwaan kecurangannya diambil dari pernyataan tuntutan terpinda. Isu sebenarnya ialah sama ada laporan yang disiarkan perayu-perayu adalah adil dan tepat dan muktahir mengenai prosiding mahkamah tersebut. Kata-kata mustahak s. 11(1) Akta tersebut adalah kata-kata pembukaannya iaitu "A fair and accurate and contemporaneous report …" dan bukan kata-kata "publicly heard". Hanya laporan-laporan yang adil dan tepat dan muktahir diberi perlindungan mutlak. Bukan semua laporan-laporan prosiding yang didengar secara umum diberi perlindungan mutlak. Dengan itu, pembelaan perlindungan mutlak hanya akan diberi jika laporan prosiding yang didengar secara umum adalah adil, tepat dan muktahir.

[2] Autoriti-autoriti dan hujahan-hujahan menunjukkan bahawa laporan mengenai prosiding mahkamah yang didengar umum di hadapan Mahkamah Tinggi boleh mengandungi petikan pliding. Juga, pliding-pliding tidak perlu dibaca semasa prosiding berjalan terlebih dahulu sebelum penyiarannya boleh dibuat. Dengan itu, ianya mengikut bahawa bahagian pertama soalan yang dikemukakan di hadapan mahkamah patut dijawab secara positif manakala bahagian kedua soalan tersebut patut dijawab secara negatif. Tetapi, ianya mesti ditekankan bahawa intipati s. 11(1) Akta tersebut ialah sama ada laporan yang disiarkan adalah adil dan tepat dan muktahir mengenai prosiding mahkamah. Tambahan pula, suatu laporan yang adil dan tepat dan muktahir boleh disiarkan dengan termasuk atau tidak termasuk suatu petikan pliding. Seksyen 11(1) Akta tersebut jelas sekali

adalah makluman statutori bahawa suatu laporan yang adil dan tepat dan muktahir akan menikmati perlindungan mutlak daripada suatu tindakan fitnah.

Case(s) referred to:
Burnett & Hallamshire Fuel, Ltd v. Sheffield Telegraph & Star Ltd [1960] Sheffield Assizes 157 ***(refd)***
Butler v. Saskatoon Star-Phoenix Ltd [1930] 1 DLR 1009 ***(refd)***
Cowie v. Robinson [1928] 3 DLR 77 ***(refd)***
Cunningham v. The Scotsman Publications Ltd [1987] SLT 698 ***(refd)***
Harper v. Provincial Newspapers Ltd [1937] SLT 462 ***(refd)***
Home Office v. Harman [1982] 1 All ER 532 ***(refd)***
Karpal Singh v. DP Vijandran [2003] 2 AMR 612 ***(refd)***
Lim Geak Liang v. East West UMI Insurance Bhd [1997] 4 CLJ 405 FC ***(refd)***
Mahadevi Nadchatiram v. Thiruchelvasegaram Manickanickavasegar [2003] 4 CLJ 20 FC ***(refd)***
Raphael Pura v. Insas Bhd & Anor[2003] 1 CLJ 61 FC ***(refd)***
Richardson v. Wilson [1879] 7 R 237 ***(refd)***
Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Anor v. Arab-Malaysian Prima Realty Sdn Bhd & Ors [2003] 3 CLJ 349 FC ***(refd)***
Stern v. Piper & Ors [1997] QB 123 ***(refd)***
Webb v. Times Publishing Co Ltd [1960] 2 QB 535 ***(refd)***

Legislation referred to:
Defamation Act 1957, s. 11(1)

Other source(s) referred to:
Carter-Ruck on Libel and Slander, 4th edn, p 126
Halsbury's Laws of England, 4th edn, vol 28, para 123, p 64
Gatley on Libel and Slander, 9th edn, p 319

For the appellants - JA Yeoh; M/s Shearn Delamore & Co
Respondent in person; M/s V Muthusamy & Assoc

Reported by Usha Thiagarajah

JUDGMENT

Abdul Malek Ahmad PCA:
The respondent is an advocate and solicitor and was at one time a member of the Penang State Assembly. The appellants are respectively the staff reporter, editor and publisher of the New Straits Times (hereinafter "the NST"), one of the leading local newspapers.

The respondent had sued the appellants for libel arising from the publication of a report entitled "Lawyer and trader conspired to cheat me, claims driver" which appeared in the NST on 12 September 1991, together with the respondent's photograph. The defence of the appellants was that the said report was a fair and accurate and contemporaneous report of proceedings publicly heard before a court lawfully exercising judicial authority. In those circumstances, they were protected under the defence of absolute privilege pursuant to s. 11 of the Defamation Act 1957 (hereinafter "the Act").

On 10 November 2000, the learned High Court Judge (Wan Adnan J) allowed the respondent's claim and awarded the sum of RM300,000 as general damages and the sum of RM50,000 as aggravated damages plus interest thereon at 8 per cent per annum from the date of judgment and costs. The appellants accordingly appealed to the Court of Appeal against that High Court decision as regards both liability and quantum. The respondent cross-appealed on the quantum.

On 1 August 2003, the Court of Appeal (Mokhtar Sidin, Arifin Zakaria and Rahmah Hussain JJCA) dismissed the appeal on liability but allowed the appellant's appeal on quantum. The award of general damages of RM300,000 was reduced to RM100,000 and the award of aggravated damages of RM50,000 was set aside. The respondent's cross-appeal was dismissed with no order as to costs except that interest on the award was to run from the date of publication of the impugned report in the light of the ruling of this court in *Karpal Singh v. DP Vijandran* [2003] 2 AMR 612. The appellants were awarded only half costs to be taxed.

On 3 March 2004, this Court (Abdul Hamid Mohamad, Mohd Noor Ahmad and Pajan Singh Gill FCJJ) granted the appellants leave to appeal on the following question:

> whether a fair and accurate report of the proceedings publicly heard before the High Court may include an extract of the pleadings and if so, whether the pleadings should first be read out in the course of the proceedings before publication can be made of the pleadings.

We heard the arguments on 28 July 2004 and adjourned the matter to 4 August 2004, when we told both parties to submit further authorities on the question posed. Accordingly, we reserved judgment.

Section 11(1) of the Act states:

> (1) A fair and accurate and contemporaneous report of proceedings publicly heard before any court lawfully exercising judicial authority within Malaysia and of the judgment, sentence or finding of any of any such court shall be absolutely privileged, and any fair and bona fide comment thereon shall be protected, although such judgment, sentence or finding be subsequently reversed, quashed or varied, unless at the time of the publication of such report or comment the defendant who claims the protection afforded by this section knew or ought to have known of such reversal, quashing or variation.

The impugned report is reproduced below:

> NEWS THURSDAY, SEPTEMBER 12, 1991
>
> Lawyer and trader conspired to cheat me, claims driver
>
> PENANG, Wed. – A lawyer allegedly conspired to cheat an illiterate man who had engaged him to facilitate the purchase of a property in Kulim, Kedah, the High Court was told today.
>
> Driver G. Paramasevam claimed that his lawyer V. Muthusamy had breached their contract by allowing the land, worth $70,0000, to be transferred to a businessman nine years ago without his knowledge or permission.
>
> He said that when he demanded an explanation from Mr Muthusamy, the lawyer claimed he did not know anything and asked him to leave his office.
>
> He has named in his suit, businessman Varlivell alias V. Vadiveloo as the first defendant and Mr Muthusamy as the second defendant.
>
> He claimed he was cheated of the property as a result of the conspiracy between the two defendants and is seeking an order for the return of his property, damages and costs.
>
> At the start of today's proceedings, Mr. Paramasevam's counsel Mr Karpal Singh objected to Mr Muthusamy's dual roles as both counsel and defendant in the case. Mr. Muthusamy who is represented by Mr Yeap Ghim Guan, is representing Mr. Vadiveloo.
>
> However, Mr Muthusamy assured Mr Justice Mohamed Dzaiddin Abdullah that there would be no complications. He also complained to the court that "several reporters have got hold of the case documents and that is why they have all come here today".
>
> In his testimony, Mr Paramasevam said he and Mr Vadiveloo were former business partners in Singapore before his return to Penang in 1982.

They had a falling out after he asked Mr Vadiveloo, who is married to his sister's daughter, for the return of a $100,000 loan. However, the latter repaid part of the loan in two instalments of $35,000 each after Mr Paramasevam decided to buy the land.

On Feb 2, 1982, Mr Muthusamy informed me at his office that the vendor had charged the property to Malayan Banking. He asked me to pay a $35,000 deposit and promised to settle the problem with the bank.

Three weeks later, I visisted his office where I was asked to sign an agreement. He also reminded me to pay the balance within six months," he said.

Mr Paramasevam did this on Aug 18 when Mr Vadiveloo repaid him another $35,000 which he immediately handed over to Mr Muthusamy's office.

When he failed to receive the title to the property after three months he returned to the legal firm but was only asked to sign three letters and told to wait a while more.

"A few days later, I got into financial difficulties and decided to sell the land. I brought a prospective buyer to Mr Muthusamy's office but was told by the clerk that the land did not belong to me."

After confirming this with a literate friend, Mr Paramasevam confronted Mr Muthusamy but was instead scolded and told to get out of the office.

"I phoned Vadiveloo and asked him why he had cheated me. He said he would not leave me alone until I become a beggar."

The judge set Nov 30 as the next date of hearing.

It was the respondent's contention that the headline and the first, second and fifth paragraphs of the report together with his photograph, in their natural and ordinary meaning, meant and were understood to mean that the respondent was a cheat and a dishonest person and not fit to practise law and to hold public office.

The appellants admit that they had published extracts of the pleadings in the amended statement of claim filed in the High Court but submit that the extracts were from pleadings in the said amended statement of claim which do in fact contain allegations of fraud and misrepresentations as well as allegations of conspiracy against the respondent in breach of contract and contrary to professional etiquette and ethics.

The appellants also submit that a fair and accurate report of the proceedings publicly heard before the High Court may include an extract of the pleadings and that it is not necessary that the pleadings should first be read out in the course of the proceedings before publication can be made of the pleadings.

The learned High Court Judge, in his grounds of judgment, held that the appellants had failed to prove that the report is a fair and accurate and contemporaneous report of the court proceedings.

The Court of Appeal held that the publication of part of the amended statement of claim, which has not been read out in open court, is not within the scope of the protection given by s. 11(1) of the Act.

Where slander is alleged, a defendant could have said the nastiest things to the plaintiff but if no one else heard them, the plaintiff simply has no cause of action. In libel cases, we are concerned with the publication in writing.

In the instant case, the appellants admitted the publication of the report. But what was the practical effect of the appellants copying and publishing the unproved allegations in the amended statement of claim, including the use of the words "lawyer conspired" and "cheat me", without mentioning any of the averments made by the respondent? It is quite a different thing if documentary evidence proving that the respondent did cheat his client was adduced in court and the appellants had reported that the High Court Judge held such documentary evidence to be admissible.

It is obvious that those who read the appellants' report would have questioned the respondent's honesty because nothing was mentioned in the report about his averments despite serious allegations of dishonesty being plucked from the amended statement of claim and published in the said report.

The real issue in this case is whether the report published by the appellants was a fair and accurate and contemporaneous report of the proceedings heard before the High Court at Penang on 11 September 1991. The crucial words of s. 11(1) of the Act are the opening words, that is, "A fair and accurate and contemporaneous report …" and not the words "publicly heard". Only reports that are fair and accurate and contemporaneous are absolutely privileged. Not all reports of proceedings publicly heard would be absolutely privileged. In other words, the defence of absolute privilege would be available only if a report of proceedings publicly heard is fair and accurate and contemporaneous.

Applying this test to the facts of this case, it is clear from the submissions of the respondent that regardless of where the source for the report was from, whether it was from the amended statement of claim or from the notes of the witnesses' testimony, the report published by the appellants was clearly an unfair and inaccurate report of the proceedings held on 11 September 1991. Consequently, he maintained that the Court of Appeal was right to dismiss

the appeal on the issue of defamation. Since leave to cross-appeal was dismissed, he reiterated that the judgment of the Court of Appeal must be wholly upheld.

In *Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Anor v. Arab-Malaysian Prima Realty Sdn Bhd & Ors* [2003] 3 CLJ 349, this court held that even assuming for a moment that the Court of Appeal erred in the application of the principles of law to the particular set of facts in the instant appeal, there is no room for this court to reverse the concurrent findings of fact made by the High Court and the Court of Appeal since it is trite that the appellate court is not prepared to interfere with the concurrent findings of fact made by the courts below. (See *Lim Geak Liang v. East West UMI Insurance Bhd* [1997] 4 CLJ 405).

However, it is still necessary to answer the question posed to this court. In *Raphael Pura v. Insas Bhd & Anor* [2003] 1 CLJ 61, it was held that since leave to appeal was granted, this court ought to consider and answer the question posed at the leave stage. As pointed out earlier, the Court of Appeal held that the publication of part of the amended statement of claim, which had not been read out in open court, is not within the scope of the protection given by s. 11(1) of the Act.

To answer the question posed, it is appropriate to deal with some of these authorities at this juncture. In *Mahadevi a/p Nadchatiram v. Thiruchelvasegaram a/l Manickanickavasegar* [2003] 4 CLJ 20, the following two questions were posed to this court and we answered both questions in the negative:

(a) whether a statement made by one counsel to the opposing counsel in court premises when the court is not in session in respect and related to matters concerning the court proceedings is covered by absolute or qualified privilege?

(b) whether defamatory words written by a party on the acknowledgment copy of a writ or in other court documents whilst accepting service, which are part of the court documents in a pending court proceedings, covered by absolute privilege in the light of, *inter alia*, the Court of Appeal decision in *Lincoln v. Daniels* [1962] 1 QB 237?

In *Stern v. Piper and Others* [1997] QB 123, a newspaper published an article in its financial pages which made adverse comments about the plaintiff's conduct, quoting from an affirmation prepared in connection with a pending High Court action for debt against the plaintiff. The Court of Appeal in England held that the article was not protected by the privilege attaching to fair and accurate reports of proceedings in open court, since the privilege did not extend to court documents which had not been brought into the public arena: that the case did not belong to the limited category of cases in which, although the communication was not privileged, it was open to a defendant to plead that his repetition of the defamatory material was true or bore a lesser defamatory meaning than the original publication: and that, accordingly, the plea of justification would be struck out.

In *Webb v. Times Publishing Co. Ltd.* [1960] 2 QB 535, Pearson J had this to say at pp. 559 and 560:

> But in our opinion the true ground is that given by Lawrence J in *Rex v. Wright* [1799] 8 TR 293, 298 namely, that 'though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of courts of justice should be universally known. The general advantage to the country in having these proceedings made public, more than counter-balances the inconvenience to the private persons whose conduct may be the subject of such proceedings.'…
>
> Mr. Gardiner gave a very interesting historical survey of the cases relating to the privilege for reports of judicial proceedings, and I have collected from them five reasons assigned for that privilege. First, it is said that court proceedings are open to the public, and it follows that reports of them should be freely permitted. I have already referred to the passage in *Wason v. Walter* LR 4 QB 73, 87-88. There is also an older case called *Curry v. Walter* [1796] 1 B & P 525. Then there is *Andrew v. Chapman* [1853] 3 C & K 286 and *Lewis v. Levy* [1858] EB & E 537, 558 … .

At p. 319 of *Gatley on Libel and Slander*, 9th edn, the author states:

> Publication of contents of documents not brought up in open court. Privilege will, of course, attach to the publication in a newspaper of a document read out in open court and filed as an exhibit in an action or to a fair and accurate statement of the contents of such document, but privilege will not attach to the publication in a newspaper of the contents of pleadings, affidavits, or other papers filed in civil proceedings and not brought up in open court. "It would be carrying privilege farther than we feel prepared to carry it, to say that, by the easy means of entitling and filing a statement of claim in a cause, a sufficient foundation may be laid for scattering any libel broadcast with impunity." The same rule applies to the publication of the contents of documents

filed in pending criminal proceedings, and not brought up in open court. The fact that the public is bound to become aware of the contents of the documents at the trial does not justify their prior dissemination on the ground of public interest.

Paragraph 123 at page 64 of *Halsbury's Laws of England,* 4th edn, vol. 28 is reproduced below:

123. What constitutes a fair and accurate report. The report must be fair and impartial, although it need not be verbatim, and should convey to its readers the substance of what has taken place in court as if they had been present, since this is the reason for the privilege. A report in a daily newspaper should not be judged by the standards of professional law reporters. A newspaper is under no obligation to verify the accuracy of statements made in the course of proceedings.

The report of a portion only of the legal proceedings may in many cases detract from its fairness and accuracy. Thus, it may be misleading to report the opening speech of counsel without the evidence on which it is founded, or the evidence of a witness without the cross-examination. However, it is not necessary as a matter of law that the report should be a report of the whole of the proceedings. The publication of a report of a separate part of proceedings will be privileged if it is fair and accurate and published without malice.

In *Burnett & Hallamshire Fuel, Ltd. v. Sheffield Telegraph & Star, Ltd.* [1960] Sheffield Assizes 157, Salmon J said:

There is no rule of law that a newspaper, before publishing a report of proceedings in court, is bound to verify whether what learned counsel or a solicitor has said is accurate or whether what a witness says is accurate. The function of a newspaper is to give a fair and accurate account of what happens in court. The public is entitled to be in court and to listen, and the public is entitled to know what is going on in the court through their newspapers. That is a fundamental right of the public, and it depends to no little extent on what is called the freedom to the press. It is really the freedom of all of us. So you can consider the question whether this is a fair and accurate report untrammelled by any rule of law. It is entirely a matter of fact for you to say – "Is that a fair and accurate report of those judicial proceedings?"

Carter-Ruck on Libel and Slander, 4th edn at p. 126 states:

6 Newspaper reports of judicial proceedings

At common law anyone is entitled to publish a fair and accurate report of judicial proceedings which have been heard in public and such a report is, generally speaking, published on an occasion of qualified privilege.

> By the Law of Libel Amendment Act 1888 s. 3 as amended by the Defamation Act 1952 ss. 8 and 9(2) 'privilege' is accorded to contemporaneous newspaper and wireless broadcast reports and reports included in a cable programme of proceedings publicly heard before courts exercising judicial authority within the UK providing that such reports are fair and accurate and not blasphemous or indecent. The reason for this provision is that it is in the public interest that those not actually present in court should have an opportunity of knowing what is taking place.
>
> One aspect of the section deserves particular mention. In the past it has been doubted whether the effect of the section is to confer an absolute, or merely a qualified, privilege upon the reports in question but there is now a decision of the High Court that the privilege conferred is absolute. Although decisions of the High Court are not binding upon other High Court Judges the probability is that they will be followed. The arguments in support of the view that the privilege is absolute are that in the first place, had Parliament intended to confer qualified privilege – that is to say privilege which is vitiated on proof of malice – the section would have been wholly unnecessary because it would only have been declaratory of the existing law, and secondly, a comparison of s. 3 and s. 4 of the 1888 Act shows that whereas express words are used in s. 4 to make the privilege conferred by that section qualified only, no such words appear in s. 3. The Faulks Committee recommended that the uncertainty should be resolved by express statutory provision to the effect that the privilege conferred on fair and accurate reports of judicial proceedings published contemporaneously is absolute.

In *Butler v. Saskatoon Star-Phoenix Ltd*. [1930] 1 DLR 1009, Macdonald J said:

> The document was read in Court on the trial of the action of the plaintiff against Harrison & Hainsworth and was filed in said Court as an exhibit. It therefore became a public document, and the defendant herein had the right to publish it as a part of its report of the judicial proceedings so held in open Court.

Lord President Inglis in *Richardson v. Wilson* [1879] 7 R 237 said at p. 241:

> The publication by newspapers of what takes place in Court at the hearing of any cause is undoubtedly lawful; and if it be reported in a fair and faithful manner the publisher is not responsible though the report contain statements or details of evidence affecting the character of either of the parties or of other persons; and whatever takes place in open Court falls under the same rule, though it may be either before or after the proper hearing of the cause. The principle on which this rule is founded seems to be that, as Courts of Justice are open to the public, anything that takes place before a Judge or Judges is thereby necessarily and legitimately made public, and, being once made legitimately public property, may be republished without inferring any responsibility.

In *Cowie v. Robinson* [1928] 3 DLR 77 (SBA 44), it was held:

> The mere fact that the information was not read aloud before the Magistrate on the 12th does not make it any the less a part of the proceedings 'publicly heard'. These words, 'publicly heard', refer to the proceedings, and merely indicate that the public were not excluded as may be directed by the Magistrate. It seems to me that an affidavit filed on a motion in court, and 'taken as read', is quite as truly a part of the proceedings on the hearing of the motion as it would be if it were read aloud. I think the same holds good with respect to an information which is the foundation of the proceedings before the Magistrate.

In *Cunningham v. The Scotsman Publications Ltd* [1987] SLT 698 (SBA 102), it was submitted by the plaintiff's counsel that putting the document before the judge is not enough to constitute its publication in open court and that the document must be actually read out if qualified privilege is to be available. In his judgment, Lord Clyde disagreed and said:

> In order to make a realistic application of the principle to the circumstances of the present case, I cannot restrict the availability of the privilege to a report of what is actually read out in court. The test in my view is not what is actually read out – although all that is read out is published – but what is in the presentation of the case intended to be published and so put in the same position as if it had been read out. If it is referred to and founded upon before the court with a view to advancing the submission which is being made, it is to be taken as published …
>
> To determine the scope of privileged reporting by reference to the method of communication between counsel and judge seems to me to involve the adoption of a standard which could be fixed by chance, caprice or idiosyncrasy. The decision to read or not to read passages in the pleading may depend on a variety of circumstances, such as whether or not the judge has had an opportunity to read the pleadings in advance of the hearing, whether counsel wishes to emphasise a passage or satisfy himself that the judge has fully noted the significance or importance of a passage, whether the matter is so plain and so fully pled that by reading short, or by merely indicating the subject matter of successive paragraphs, the whole case can be explained, or whether the matter is so urgent that pleadings prepared in haste require to be read and enlarged upon in oral submission. Styles of advocacy may vary substantially and one advocate may, in his own style, prefer to read passage of pleadings where another in the same case would summarise or simply make reference….

> Moreover the court already has the responsibility of deciding whether a hearing should be within closed doors. But while these controls exist over what is or is not to be published, it seems to me that by making publication depend upon whether or not a document which is founded upon in court is, or is not, read aloud by counsel or judge in open court, suspicion of secrecy may more easily be invited and the broad purpose which lies behind the principle of openness may be put at the risk of frustration.

Home Office v. Harman [1982] 1 All ER 532 is illuminating. Lord Roskill at p. 553 was of the view that the operation of a rule should not depend on whether a document was read aloud or not read aloud in open court. He held:

> In litigation involving very large numbers of documents – today the means of mechanical reproduction and telex machines have vastly increased the number and size of bundles of documents in many classes of litigation – it may be a matter of chance whether a particular document is read aloud in open court of not. Some judges may in order to save public time and the pockets of litigants read large bundles of documents out of court and thereafter firmly discourage repetitive reading by counsel. Other judges may read ahead of counsel while counsel is reading and equally firmly discourage counsel from thereafter reading slowly that which the judge has already rapidly and sufficiently absorbed by his perusal of the printed page. Yet others may wish, irrespective of the consequent expenditure of time, to have every word of every document read aloud, though one hopes that his uneconomic procedure has become increasingly unusual in modern times. I mention these matters because a rule which made freedom of access to discovered documents depend upon whether or not particular documents are actually read aloud could and well might operate capriciously; and for one letter to be freely available because it had been so read while the answer to it remained subject to the undertaking seems, at least to me, difficult to justify in principle.

In *Harper v. Provincial Newspapers Ltd* [1937] SLT 462, it was held that a newspaper report of proceedings to be privileged although the report included the address of the person convicted but which had not been read out in open court. Lord Jamieson ruled:

> While the publicity given to court proceedings is thus the basis of the privilege, to limit its scope to what is actually said by judge, counsel or witnesses might not only render the reporting of what takes place of no interest, but might even lead to a report being misleading and unfair. Thus it not infrequently happens that, in the course of a discussion, counsel refer to the litigants simply as 'pursuer' and 'defender', and their names and designations are never openly mentioned. In such a case it would be absurd to say that an article, correctly reporting what took place in court, lost its privilege because the names and designations of the parties appearing in the written pleadings had been published. Again, reference may be made to a document before the court, and without a description of, and indeed some quotation from, the document, a report of the proceedings might be altogether unintelligible.

Having considered the authorities and the arguments, we are of the view that a report of the proceedings publicly heard before the High Court may include an extract of the pleadings and it is not necessary that the pleadings should first be read out in the course of the proceedings before publication can be made of the pleadings. Thus, our opinion is that, we would answer the first part of the question in the positive and the second part of the question in the negative, but we must reiterate that the essence of s. 11(1) of the Act is whether the report published is a fair and accurate and contemporaneous report of the proceedings.

Having answered the question in that manner, we would add that it is possible to publish a fair and accurate and contemporaneous report with or without including an extract of the pleadings. The ultimate question is whether the report is a fair and accurate and contemporaneous one and in this regard, s. 11(1) of the Act is abundantly clear in statutorily declaring that a fair and accurate and contemporaneous report of court proceedings shall enjoy absolute privilege against an action for defamation.

The appeal is accordingly allowed with costs and the orders of the High Court and the Court of Appeal are hereby set aside. The deposit is refunded to the appellants.